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Hong Kong Employment Updates at a Glance: From the Abolishment of the China Work Permit Requirement to Enhanced Employees' Benefits

In this article, Vivien Chan & Co. will outline recent updates to the Hong Kong employment law which both employers and employees should pay attention to.

I. ABOLISHMENT OF CHINA WORK PERMIT REQUIREMENT FOR HONG KONG RESIDENTS

Prior to the abolishment of the China work permit system, for Hong Kong, Macau and Taiwan residents (HMT residents) to work in the mainland China, it must be proved that the HMT residents were uniquely qualified and that their posts could not be filled by local Mainland residents despite the posts being advertised for at least 3 weeks. Further, up to 10 documents had to be submitted to the municipal human resources department to obtain the work permit.

On 3 August 2018, the State Council released the *Decision of the State Council to Cancel a Group of Administrative Licensing Items* which abolished the work permit system for HMT residents. The circular also instructed the Ministry of Human Resources and Social Security to formulate supporting policies to implement the abolishment. By the end of 2018, the work permits previously issued have been no longer valid, and currently, employment contract, salary or social security payment records can be used as evidence to prove employment in the mainland China.

This is a significant shift in policy enabling HMT residents to generally be treated the same as mainland residents in the employment context. However, it should be noted that the

change in policy implies that HMT residents will now enjoy the statutory labor and security rights under the PRC labour laws. In case of employment disputes, the disputes will also be handled in accordance with the Chinese laws.

II. LABOUR TRIBUNAL EMPOWERED TO ORDER RE-INSTATEMENT OR RE-ENGAGEMENT OF UNLAWFULLY AND UNREASONABLY TERMINATED EMPLOYEES

Pursuant to the *Employment (Amendment) (No.2) Ordinance 2018* (the "Amendment Ordinance"), which came into effect on 19 October 2018, the Labour Tribunal is empowered to order compulsory reinstatement or re-engagement of an employee if the employee has been unreasonably and unlawfully dismissed and the reinstatement or re-engagement is reasonably practicable. This changes the previous situation which the Labour Tribunal could only make an order for reinstatement or re-engagement with the consent of both the employer and employee.

Under the Amendment Ordinance, if the employer refuses to reinstate or re-engage the relevant employee, the employer shall pay the employee a sum equivalent to 3 times of his/her average monthly wages up to a maximum of HK\$72,500,

in addition to regular statutory terminal payments. Further, the employer commits a criminal offence if he/she willfully or without reasonable excuse fails to pay the sum.

The amendment brings concerns to employers that the application for re-instatement or re-engagement may be leveraged by employees in their negotiation for a more favorable settlement agreement with the employer. As a countermeasure, given that the order for re-instatement or re-engagement only applies to dismissal without a valid reason, employers should keep a good record of the evidence showing a valid reason for the termination such that the dismissal cannot be argued by the employee to be unreasonable and unlawful.

III. UPDATES TO THE MANDATORY PROVIDENT FUND ("MPF") SCHEME

(a) Proposed Abolition of the MPF Offsetting Mechanism

Under the current MPF offsetting mechanism pursuant to section 12A of the *Mandatory Provident Fund Schemes Ordinance*, an employer can offset the statutory severance payment or long service payment against accrued benefits attributable to the employer's MPF contributions. The offsetting mechanism has long been criticized to deprive employees of their retirement protection and in response, the Government put forward a proposal for abolishing the offsetting mechanism in the beginning of 2018. The Chief Executive also announced in the policy address 2018 that the Government targeted to secure the passage of the enabling legislation by 2022 and to implement the abolition arrangement 2 years afterwards.

To secure support from the employer group, the government pledged to a subsidy of HK\$29 billion to employers for over 25 years after abolition of the offsetting mechanism in 2022 in its latest proposal, which is significantly more favorable than the previous offer of HK\$17.2 billion for 12 years.

Although the proposal is still currently in its preliminary stage, given the Government's determination to implement the abolition, employers should remain vigilant as to the further changes to the proposal and arrangement of the subsidy scheme.

(b) Introduction of Tax Deductions for Deferred Annuity Premiums and MPF Voluntary Contributions

The *Inland Revenue and MPF Schemes Legislation (Tax Deductions for Annuity Premiums and MPF Voluntary Contributions) (Amendment) Bill 2018* (the "Amendment Bill") introduced into the Legislative Council for first reading in December 2018 seeks to introduce tax deductions for the purchase of deferred annuity premiums and making of MPF Tax Deductible Voluntary Contributions (TVCs) to encourage voluntary savings for retirement.

Under the current regime, employees can only claim tax deductions for their mandatory contributions to MPF subject to a limit of \$18,000 per year, and voluntary contributions are not tax deductible. It is proposed in the Amendment Bill to introduce a maximum tax deductible limit of HK\$60,000 per year for making voluntary contributions to the MPF. It will be an aggregate limit for deferred annuity premiums and TVCs for greater flexibility, which means that whether the employee purchases HK\$60,000 of deferred annuity premiums or makes TVCs of HK\$60,000, he/she can still claim a maximum of HK\$60,000 deduction to the salaries tax.

The Amendment Bill is generally welcomed by employee groups and it is expected to be passed early this year with the tax deduction to take effect from the 2019-2020 assessment year.

IV. ENHANCED EMPLOYEE BENEFITS

(a) Statutory Paternity Leave

The statutory paternity leave has increased from 3 to 5 days as per the commencement of the *Employment (Amendment) (No.3) Ordinance 2018* on 18 January 2019. Apart from the increase in the number of days of the Statutory Paternity Leave, no amendment is made to other aspects. For example, the male employee must still be employed under a continuous employment contract (i.e. employed for at least 18 hours a week for 4 weeks per month) to enjoy the Statutory Paternity Leave and/or a continuous contract for not less than 40 weeks to be entitled to the Statutory Paternity Leave pay rate at 80% of his average daily wages.

(b) Statutory Maternity Leave & Labour Protection for Pregnant Employees

Under the current regime, female employees who have been employed under a continuous contract for at least 40 weeks are entitled to 10 weeks of statutory maternity leave with 80% of their average daily wages. To keep pace with the global standard, the Chief Executive proposed in the Policy Address 2018 to increase the maternity leave period to 14 weeks with the same leave pay rate which will be subject to a cap of HK\$36,822. The Government further proposed to reimburse employers of the additional 4 weeks' statutory maternity leave pay. Although the amendment is yet to come into effect, to set a good example for employers, the Government has already extended the maternity leave of civil servants to 14 weeks starting from 10 October 2018.

On the other hand, to safeguard pregnant employees' entitlement to more paid sick leave for maternity checks, the Government proposed to extend the type of acceptable proof documents from only doctor's certificate to receipts and notices of maternity checks. It is also proposed for the paid maternity leave to be extended to female employees who suffer a miscarriage from after 28 weeks to 24 weeks of their pregnancy.

Currently, there is no proposed timeline for implementing the changes and it is expected that there will be heated arguments over the changes given that the maternity leave policy has been in place for over 40 years.

(c) Statutory Minimum Wage

Since the introduction of the Statutory Minimum Wage in 2011, the Statutory Minimum Wage rate has increased from HK\$28 per hour to HK\$34.50 in 2017. The latest development rests with the gazette of the *Minimum Wage Ordinance (Amendment of Schedule 3) Notice 2019* which proposes an increase in the Statutory Minimum Wage rate to HK\$37.50. The notice was introduced into the Legislative Council on 23 January 2019 and subject to the Legislative Council's approval, the increased Statutory Minimum Wage rate will take effect on 1 May 2019.

From the above recent updates, an overall enhancement in employee's benefits can be seen. Employers, on the other hand, are reminded to make suitable arrangements to cater for the changes in statutory requirements and pay close attention to the implementation of the proposed policies.